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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: TIME WARNER INC.
SECURITIES LITIGATION.

ZVI TRADING CORP. EMPLOYEES'
MONEY PURCHASE PENSION PLAN AND TRUST
and BARRY ZONON,

Cross-Petitioners,

vs.

STEVEN J. ROSS, N.J. NICHOLAS, JR.,
GERALD M. LEVIN, BERT W. WASSERMAN,
and TIME WARNER INC.,

Cross-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the decision below that petitioners' statements prior to May 1, 1991, "hyp[ing] strategic alliances" were not actionable as a matter of law undermines the philosophy of full disclosure underlying the federal securities laws and conflicts with this Court's decision in Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991)?

II. Whether the court below improperly concluded that Federal Rule of Civil Procedure 9(b) requires dismissal of plaintiffs' allegations of fraudulent statements by corporate "spokespersons" whose names cannot be ascertained by plaintiffs prior to discovery and, therefore, cannot be recited in the complaint?

PARTIES TO THE PROCEEDING

Respondents and cross-petitioners, plaintiffs in the district court and appellants in the court of appeals, are ZVI Trading Corp. Employees' Money Purchase Pension Plan and Barry Zonon. Petitioners and cross-respondents, defendants in the district court and appellees in the court of appeals, are Time Warner Inc., Steven J. Ross, N. J. Nicholas, Jr., Gerald M. Levin and Bert W. Wasserman.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents hereby cross-petition for a writ of certiorari to review certain aspects of the opinion of the United States Court of Appeals for the Second Circuit. Respondents respectfully request that the Court consider this conditional cross-petition only in the event that the Court grants the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals is reported at 9 F.3d 259, and also is set forth in the appendix attached to the petition for a writ of certiorari (Pet. 14a-42a). The district court's opinion, reported at 794 F. Supp. 1252, as well as the district court's opinion denying

reconsideration, 1992 U.S. Dist. LEXIS 10057 (Pet. 43a-45a), also are set forth in petitioners' appendix (Pet. 46a-67a).

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory and regulatory provisions involved in this cross-petition are Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5.

> § 78j. Manipulative and deceptive devices.
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or

instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the

public interest or for the protection of investors.

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

> in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

Cross-petitioners respectfully refer the Court to their brief in opposition to the petition for a writ of certiorari for a complete discussion of the background facts and the decision of the Second Circuit.

REASONS FOR GRANTING THE CROSS-PETITION

In holding that petitioners' statements prior to May 1, 1991, regarding strategic alliances were not actionable and, therefore, did not give rise to a duty to disclose the problems that developed in petitioners' strategic alliance negotiations, the Second Circuit's decision undermines the policies of full disclosure underlying the

federal securities laws and conflicts with the decisions of this Court. In addition, the Second Circuit's holding that Federal Rule 9(b) requires that plaintiffs, without the benefit of discovery, must, at the pleading stage, identify the speaker when allegedly fraudulent statements in newspaper stories and analyst reports are attributed to "unnamed" company spokespersons, contravenes the policies underlying Rules 8(a), 9(b), and 12(b)(6); ignores the impact these statements have on the securities markets; and undermines the philosophy of full disclosure that is the bedrock of the federal securities laws.

ARGUMENT

I.

THE SECOND CIRCUIT INCORRECTLY CONCLUDED THAT PETITIONERS' PRE-MAY 1, 1991 STATEMENTS WERE NOT ACTIONABLE AS A MATTER OF LAW

The complaint alleges that, during the class period, petitioners disseminated a series of positive and optimistic statements concerning the creation of various strategic alliances with third-party investors (Pet. 20a, 21a n.2). The Second Circuit itself accepted as true the proposition that petitioners "publicly hyped strategic alliances" (Pet. 29a), and conveyed "generally positive messages" regarding petitioners' search for strategic alliances (Pet. 17a). The district court similarly found that petitioners' statements concerning strategic alliances were designed to

"drum up enthusiasm for Time Warner stock by proclaiming the advantages possible 'strategic alliances' could offer the company and its would-be partners and by reporting that negotiations were underway" (Pet. 55a).

Notwithstanding these findings, the Second Circuit held that petitioners' pre-May 1, 1991, statements concerning Time Warner's pursuit of and attempts to negotiate strategic alliances were not actionable under the federal securities laws. According to the Second Circuit, petitioners' statements lacked the "definite positive projections" that might require later correction (Pet. 26a). Thus, the Second Circuit erroneously held that petitioners had no legal obligation to disclose publicly that

their strategic alliance negotiations were proceeding unsatisfactorily, as plaintiffs had alleged. In so ruling, the Second Circuit fundamentally ignored: (1) the impact of petitioners' statements on the market price of Time Warner's common stock; (2) the materiality of petitioners' statements, which give rise to duties of disclosure under Basic, Inc. v. Levinson, 485 U.S. 224 (1988), and its progeny; and (3) the holding of this Court in Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991), that general statements of opinion, belief, and optimism are actionable under the federal securities laws.

The market had an overwhelmingly positive reaction to petitioners' statements concerning strategic alliances. On December 12, 1990, the

first day of the class period, petitioners' stock traded at approximately $86 per share. By May 1, 1991, petitioners' stock price had soared to approximately $112 per share. This dramatic 30% increase in the price of Time Warner's common stock was directly attributable to petitioners' continuous conditioning of the market to expect the consummation of one or more strategic alliance transactions. Petitioners' statements through the close of the class period continued to stimulate the market. On June 3, 1991, three days before petitioners' disclosure of a rights offering and three days before the close of the class period, defendants' stock climbed to $119 per share.

The market action of Time Warner's stock in response to

petitioners' statements evidences the materiality of those statements. See, e.g., In re Apple Computer Securities Litigation, 886 F.2d 1109, 1116 (9th Cir. 1989), cert. denied, 496 U.S. 943 (1990) ("Dramatic price movements in response to an optimistic statement would provide a strong indication that the statement itself was material...."); 5B Jacobs, Litigation and Practice under Rule 10b-5 § 61.01[b] n.69 (2d ed. 1992) ("The market reaction to a statement correcting a prior release should be evidence that the prior release was misleading"). The Second Circuit, however, failed to consider the materiality of the challenged statements, and instead found that the statements were not actionable as a matter of law. Thus, the Second Circuit completely ignored the

substantial increase in the company's stock in response to petitioners' statements throughout the class period.

Likewise, the court of appeals' holding that petitioners' statements were not actionable because they suggested only the "hope" that talks would go well is inconsistent with well-settled law. In Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991), for example, the Supreme Court held that statements by corporate directors in a proxy statement that the value shareholders would receive for their stock in a merger was "high," and that the price was "fair," were actionable under the federal securities laws. Id. at 2755. The Supreme Court reached this conclusion despite the defendants' contentions that the statements on

which liability was predicated -- "high" and "fair" -- were "indefinite and unverifiable" terms. Id. at 2758. The Court concluded that:

> The objection ignores the fact that such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading. Provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox evidentiary process that either substantiates their underlying justifications or tends to disprove their existence.

Id. at 2758-59 (emphasis added). See also Mayer v. Mylod, 988 F.2d 635, 639-40 (6th Cir. 1993) (bank's statements that it intended to have

strong financial controls and that its loan portfolio was "soundly underwritten" were actionable under federal securities laws); Hanon v. Dataproducts Corp., 976 F.2d 497, 501-03 (9th Cir. 1992) (corporation misled market by touting new product line despite technical problems); Shapiro v. UJB Financial Corp., 964 F.2d 272 (3d Cir.), cert. denied, 113 S. Ct. 365 (1992) (statements by corporate management utilizing such general labels as "conservative" and "cautious" in describing a corporation's lending practices and loan loss reserves can be a basis for federal securities violations). Petitioners' statements at issue in this case are of precisely the nature recognized by the authorities mentioned above as material, and

therefore actionable, under the federal securities laws.[1]

The Second Circuit's broad pronouncement that only definite and concrete public statements may be actionable under the federal securities laws seriously undermines, if not eliminates, the ability of defrauded investors to seek redress for their injuries in a wide variety

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[1] The Second Circuit also refused to find petitioners' pre-May 1 statements actionable because "[n]o identified defendant stated that he thought deals would be struck by a certain date, or even that it was likely that deals would be struck at all" (Pet. 26a). The court of appeals' reading of the challenged statements is not correct. For example, on November 30, 1990, plaintiffs allege that defendant Ross said that the company "continues to have serious talks that could lead to the sale of five or six separate minority stakes in its entertainment subsidiaries next year" (Pet. 24a n.3) (emphasis added). In making this statement, petitioners not only indicated that it was likely that deals would be struck but further specified a date of "next year." Likewise, on March 15, 1991, defendant Nicholas gave the impression that deals were imminent, if not being made at the time, when he affirmatively stated that "[w]e're partnering" (Pet. 24a n.3).

of situations and "subvert[s] the 1934 Act's efforts to protect investors from deliberate fraud." In re Ames Dep't Stores, Inc. Stock Litigation, 991 F.2d 953, 963 (2d Cir. 1993). As this Court instructed in Basic, Inc. v. Levinson, 485 U.S. 224, 230 (1988): "There cannot be honest markets without honest publicity." See also Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477-78 (1977) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)). In addition, this Court has emphasized that the provisions of the Exchange Act should receive the broad construction and remedial application their legislative history and language require. Bateman Eichler, Hill Richard, Inc. v. Berner, 472 U.S. 299 (1985); Herman & Maclean v.

Huddleston, 459 U.S. 375 (1983). The Second Circuit's decision allows corporate defendants to escape all consequences for the deceptive inflation of their prospects by having no accountability for their public utterances.

II.

PLAINTIFFS NEED NOT IDENTIFY THE CORPORATE "SPOKESPERSON" WHO MAKES FRAUDULENT STATEMENTS TO SURVIVE A MOTION TO DISMISS UNDER RULES 9(b) AND 12(b)(6)

The complaint alleges that certain of the challenged statements were made by company spokespersons and publicly reported by securities analysts, media persons, and other members of the investment community (Pet. 21a n.2). These statements were similar in nature and content to those directly attributed to petitioners. As evidence of this, the analyst reports consistently

refer to "[m]anagement [having] indicated" or "[a]ccording to the company."

The Second Circuit held that these statements did not satisfy Federal Rule 9(b). According to the Second Circuit, claims of misrepresentation concerning "completely unattributed statements" will be dismissed "even when the plaintiff alleges on information and belief that the unattributed statement was made by an agent of the defendant" (Pet. 23a). In holding that the unattributed statements were not actionable, the court of appeals reasoned that the function of analysts and reporters "is to determine the truth about the affairs of publicly traded companies," and, therefore, that few analysts and reporters would participate in

efforts to disseminate fraudulent statements. Id.

The Second Circuit's rationale misses the point. The issue is not whether analysts and reporters would participate in efforts to disseminate fraudulent statements. The issue is whether it was error to establish a Draconian Rule 9(b) barrier that enables -- indeed encourages -- corporate representatives to exploit business media of mass communications to manipulate the introduction of information into the marketplace under a cloak of anonymity that is impenetrable without discovery.[2]

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[2] The court's stated rationale for requiring the speaker's identity also was recently criticized in an article appearing in the New York Law Journal, Dennis J. Block and Jonathan M. Hoff, "Duty to Correct Forward Looking Disclosure," New York Law Journal, Feb. 17, 1994, at 5. There, the authors noted that the Second Circuit's decision:

(continued...)

The Second Circuit's opinion further contravenes public policy by ignoring the realities of how information is disseminated throughout the marketplace and how it is communicated to and relied upon by investors. Other courts have recognized that analysts, news reporters, and other members of the investment community are the instruments through which information is publicly disseminated and relied upon by investors in valuing a company's present and future

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[2](...continued)

> [I]s based on the questionable premise that reporters and analysts are able to determine when they are being provided with false and misleading information. Regardless of its underpinnings, the Second Circuit decision may increase the willingness of corporations to provide information to reporters and analysts as long as it is on an unattributed basis.

Id. at 8 (emphasis added).

prospects. See, e.g., Basic, 485 U.S. at 246 & n.24 ("market professionals generally consider most publicly announced statements about companies, thereby affecting stock market prices."); Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 514-15 (7th Cir. 1989) (analysts served to interpret company statements); In re Apple Computer Sec. Litigation, 886 F.2d 1109, 1116 (9th Cir. 1989), cert. denied, 496 U.S. 943 (1990) (court acknowledged that press reports fully explained what defendants had not). The Second Circuit, however, ignored these fundamental principles and erroneously concluded, without any legal or factual basis whatsoever, that "investors tend to discount information in newspaper articles and analyst reports when the author is

unable to cite specific, attributable information from the company" (Pet. 23a).

The Second Circuit's opinion not only is in conflict with public policy and the realities of the marketplace, but is also inconsistent with relevant legal authority governing the actionability of statements by corporate spokespersons. In In re Ann Taylor Store Securities Litigation, 807 F.Supp. 990, 1004 (S.D.N.Y. July 27, 1992), for example, the court specifically rejected the notion that Rule 9(b) requires a plaintiff, prior to discovery, to identify by name a company spokesperson whose statement is alleged to be materially misleading. The court held: "Prior to discovery, plaintiffs are not expected to pinpoint precisely who

uttered the statements." Id. at 1004. The court's rationale in rejecting a construction of Rule 9(b) that would be impossible to comply with in many situations is compelling:

> [T]o require more would defeat the purpose of the securities laws since any corporation could avoid liability under the 1934 Act, through the abuse of Rule 9(b), by simply issuing false and misleading statements through an anonymous spokesperson instead of a named officer or director.

Id.

Likewise, in In re Columbia Securities Litigation, 747 F. Supp. 237, 245 (S.D.N.Y. 1990), the court held:

> While defendants certainly had less than complete control over what the reporter wrote, they did have control over what Mr. Schulof said. If, as class plaintiffs allege, Mr. Schulof made a false

> statement to the Forbes reporter, that statement may properly serve as a basis for class plaintiffs' fraud claim.

See also Panzirer v. Wolf, 663 F.2d 365, 366-67 (2d Cir. 1981) (court allowed plaintiff to proceed following reliance on a news column reporting unattributed analysts' reports and reliance on Standard and Poor's tearsheets); Cytryn v. Cook, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,409, at 97,016 (N.D. Cal. July 2, 1990) (court ruled that "where the discovery has not taken place and the information is in the sole possession of the defendant, identities need not be specified").[3]

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[3] The Second Circuit's purported distinction of various authorities bearing on the actionability of non-attributed statements was in many cases attenuated or incorrect. For example, the court below distinguished Elkind v. Liggett & Meyers, Inc., 635 F.2d 156 (2d Cir. 1980), on the ground that defendants had placed their

(continued...)

Plaintiffs in this case had no discovery prior to serving the consolidated complaint. The limited document discovery they were permitted thereafter did not reveal which Time Warner spokespersons or members of management uttered the statements alleged to be misleading. Moreover, the identities of the Time Warner representatives whose statements are challenged is information in the possession of

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[3](...continued)
"imprimatur" on analyst reports. Elkind, however, stands for the proposition that, when the facts justify it, it may be reasonable to infer an imprimatur, either express or implied. The Second Circuit attempted to distinguish Alfus v. Pyramid Technology Corp., 764 F. Supp. 598 (N.D. Cal. 1991), on the same ground. Alfus, however, stands for the same unremarkable proposition as Elkind that the determination of whether defendants have placed an imprimatur on others' statements is factually driven. Finally, the Second Circuit attempted to distinguish In re Ann Taylor Securities Litigation, 807 F. Supp. 990 (S.D.N.Y. 1992), on the basis that it involved press releases. Ann Taylor in no way limited its holding to official press releases, however.

petitioners -- not plaintiffs. Thus, it is completely unreasonable to require plaintiffs to provide the detailed information the Second Circuit said was necessary under Rule 9(b). This especially is true in light of the fact that petitioners would not be burdened from limited discovery requesting them to disclose the names of the spokespersons whose statements are alleged to be fraudulent.[4] As observed in In re Craftmatic Securities Litigation, 890 F.2d 628, 645 (3d Cir. 1989) (citation omitted), "[c]ourts must be sensitive to the fact that application of Rule 9(b) prior to discovery 'may permit sophisticated

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[4] This Court should, at the very least, grant plaintiffs in the situation presented in this case leave to take limited and narrowly-tailored discovery to identify the "spokespersons" whose statements are challenged in the complaint.

defrauders to successfully conceal the details of their fraud.'"[5]

In sum, petitioners should not be immunized from liability by a Draconian application of Rule 9(b) that enables corporate spokespersons to speak anonymously and make misleading and partial disclosures to securities analysts, the media, and others with full knowledge that the information will be widely disseminated to and relied on by the investing public. Common sense makes

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[5] The court's opinion would also exculpate defendants for omitting information that was otherwise disseminated into the marketplace through analysts' reports and statements by the press, but, through a rigid application of Rule 9(b), deny plaintiffs the ability to rely on those same statements to establish defendants' liability. See, e.g., Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1262 (4th Cir. 1993) (granting summary judgment on the ground that press reports of "negative publicity apprised the market of [defendant's] fiscal difficulties"); In re Apple Computer Securities Litigation, 886 F.2d 1109, 1116 (9th Cir. 1989), cert. denied, 496 U.S. 943 (1990) (same).

it obvious that it is virtually impossible for plaintiffs to know the identities of unnamed company spokespersons without discovery. The Court should make clear that it is appropriate to accept as sufficient on a pleading motion an allegation that someone speaking for the company made a statement to a journalist or analyst when it has been attributed to a company spokesperson especially when, as in this case, the "unattributed" statements are entirely consistent with statements made in annual reports, SEC filings, and other public filings. If the policies underlying the nation's securities laws are to be effective, Rule 9(b) cannot reasonably require more.

CONCLUSION

For all the foregoing reasons, the Court should grant respondents' conditional cross-petition for a writ of certiorari if it grants the petition for a writ of certiorari.

Dated: February 23, 1994

Respectfully submitted,

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